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"Employment Practices Liability Insurance – Twenty Years at A Glance"

I. State of the Market

Market Rates and Retentions are Hardening

Although resistance exists from competing insurers, rates continue to rise. The increases are not immense, but they do show a departure from the flat rates in most other insurance lines. Some insurers trying to steal customers away will forgo an increase to gain a customer, which sometimes inhibits rate increases. However, not all insureds shop around for competitive quotes when faced with an increase and so rates are still rising. Even of the insureds that do shop around, many will accept a slight increase instead of changing insurers. Retentions, on the other hand, have stayed relatively flat, except for an upward trend in California. The top four EPLI litigation generating states are New York, Texas, Florida, and California.

Volume

The volume of business based on gross written premiums for 2014 remained unchanged at $1.72 billion. Business volume, however, could trend upward towards $1.75 billion in 2015 based on rate trends and employment growth, and the same could go for 2016. Premiums for 2015-16 rose an average of 4.5% for all account sizes. One reason for the lack of substantial growth in the face of higher rates and higher exposure may be from the continuing movement of EPLI premium from stand-alone policies to packaged management liability policies.

Defense Costs

As cases become more complex, defense costs are increasing. Insurers are now utilizing different methods of managing this growth, including bringing routine claims in-house, minimizing the size of defense panels, and putting more cost restrictions on defense counsel. Controls on billing rates are even being negotiated. Defense firms are responding in various ways, such as charging fixed-fee billings for certain types of claims. Furthermore, the market seems to be saturated with attorneys interested in EPLI defense work, and there is not enough work to go around.

II. Exposures to the Insured

Mass Claims

These claims are on the rise and are problematic for insurers writing large companies as there have been some very large settlements for claims that employers refused to fight for fear of reputational costs. These claims make it difficult for brand-name companies to buy EPLI insurance at favorable costs. Some insurers who are experienced in these types of claims will report mandatory deductibles of $1 million+, and coinsurance of 10-25%, for such insureds, while others include policy language that applies the deductible to each claim, rather than a single deductible for the group of claims.

The leading insurers stand firm on requiring large retentions for these types of claims. Insurers focusing on smaller- to mid-sized employers do not yet see these claims as problematic (since most of their insureds are not as vulnerable to the pressure of such claims) and generally have not applied any special restrictions.

Wage and Hour Claims

As emerging technologies introduce new risks, and as wage and hour class actions proliferate, employers face new vulnerabilities with regard to their employment practices. In addition to an increase in the number of claims made under these laws, there has also been an increase in claims made on a class or collective action basis, which intensifies potential exposure. Recently, wage and hour class action lawsuits under the FLSA and its state law equivalents have become increasingly popular among class action law firms. Because wage and hour suits typically allege FLSA violations regarding the method by which employees are paid, they are much more problematic for many in industries that pay employees by the hour, including tips. For employers with large workforces, the potential liability in these cases can be crushing, often in the tens to hundreds of millions of dollars. Similar violations of state and local laws have also been quite problematic for employers. It should be noted that these claims may include compliance with information required to be provided on pay stubs, meal and break period laws and, the failure to timely pay wages upon termination.

The median settlement value in the last three years was approximately $2.0 million. Some notable settlements in the past 2 years include: Brinker Restaurant Corp. – $56.5 million (the case included 108,000 workers who alleged wage and hour violations); City of Los Angeles – $26 million (the case included 1,074 trash truck drivers who alleged meal and rest break violations); Walgreen Co. – $23 million (the case included 40,000 workers who alleged that they were denied overtime and meal and rest breaks); and Schneider Logistics Transloading and Distribution Inc. – $21 million (plaintiffs alleged they were denied overtime and minimum wage).

Sick Leave / FMLA

As the workforce ages and many employees choose to defer retirement, employers are seeing an increasing amount of requests for medical leave and a greater variety of reasons for those requests. Some requests present clearly justifiable grounds for leave, while other are less cut-and-dry. Any denial of leave presents potential for a claim

against the employer, the individual supervisor or the human resources professional. In fact, because of the way the FLMA defines "employer," a number of courts have found that personal liability of managers and/or company officials can attach for those involved with FMLA decisions that affected aggrieved employees.

Legalization of Marijuana

Twenty-three states and the District of Columbia have enacted laws legalizing marijuana in some form. Marijuana, however, remains illegal at the federal level. The EEOC has not weighed in on the issue given the discrepancy between state and federal law. The big question is: Can an employer terminate an employee for testing positive for marijuana use if that employee properly obtains the drug for medicinal purposes? States are split on this.

Disability / Pregnancy

According to the EEOC, disability claims accounted for 28.6% of all EEOC claims in 2014. Moreover, the EEOC's Strategic Enforcement Plan included pregnancy-related discrimination as one of its top six priorities between 2013 and 2016. As such, this could be a potentially high area of growth in terms of the amount of claims given the Supreme Court's 2015 decision in Young v. UPS, which will affect the landscape of accommodations provided to pregnant and disabled workers going forward.

Background checks (ban the box) / FRCA

Lawsuits resulting from illegal background checks are also on the rise. Recent class actions have focused on the use of pre-hiring background checks. Therefore, employers who use background checks will want to ensure they are in compliance with the Fair Credit Reporting Act and similar state laws and that they conduct said background checks uniformly, and not merely for certain applicants or groups of applicants. Before a credit report can be requested as part of an application process, the potential employee must be notified in writing of the request and that it will be used as part of the employment decision. Written permission from the job applicant is required to obtain a credit report. With credit reporting there's always a concern that errors are made or decisions are based on inaccurate information, especially considering certain background information might be relevant for some jobs, while not necessarily relevant for others.

Nationwide, over 100 cities and counties, spanning across 19 states, have adopted what is widely known as "ban the box" legislation. "Ban the box" removes criminal conviction history questions from job applications and delays the background check inquiry until later in the hiring. Because a disproportionate amount of those with conviction records are individuals that fall within certain protected categories, this gives them a fair chance to be evaluated based upon their qualifications as opposed to their criminal background. States that have passed such legislation include California (2013, 2010), Colorado (2012), Delaware (2014), Hawaii (1998), Illinois (2014, 2013), New Jersey (2014), New York (2015), Vermont (2015), and Virginia (2015), to name a few. Considering the recent outgrowth of this legislation, there will likely be an increase of these claims against insureds.

Social Media

There are currently 1.55 billion active Facebook users. Instagram, LinkedIn and Twitter also have substantial numbers—and they're only getting larger. As for employers, this means that a comment or post about an employee has the potential for "viral" dissemination. Also, a growing amount of employees are using social media to defame, disparage or harass organizations and co-workers. EPLI does not cover disparaging or defamatory comments made by employees against one another. However, it may protect employers when an employee harasses or defames a co-worker and that co-worker sues the employer for failing to prevent such harassment. Likewise, EPLI will protect the employer when a supervisor is responsible for the inappropriate post. Protection may also be covered under CGL policies if the alleged offense comes within the scope of the policy's personal injury coverage.

III. Common Exclusions / Uncovered Exposures

Breach of Contract

Breach of contract, including breach of employment contracts and collective bargaining agreements, are also commonly excluded from coverage under an EPLI policy, however they are offered under some standard policies.

Wage and Hour / FLSA

FLSA claims traditionally have been excluded under many EPLI policies. Practically all of these policies contain language that explicitly excludes suits alleged under the FLSA (with the exception of the Equal Pay Act) or similar laws. Beyond the exclusionary language, obtaining coverage is also difficult because the claims for unpaid wages may be construed as uninsurable restitution, not damages suffered under a loss. However, it is not always clear whether or not wage and hour claims are covered in a typical EPLI policy, and our participating insurers are reluctant, in many cases, to provide definitive information. Generally, it seems that a wage and hour claim that involves other covered allegations will at least get the insured a defense.

Punitive Damages

EPLI will not cover punitive damages or claims resulting from criminal acts. There are approximately 16 states that prohibit EPLI policies from covering punitive damages, such as pain and suffering.

Workers Compensation

Certain liabilities covered by other insurance policies, such as workers compensation, are excluded from EPLI coverage.

IV. New and Evolving Coverages

Wage and Hour Coverage

Some carriers now offer limited coverage for wage and hour violations, although coverage is typically restricted to a sublimit rather than full policy limits, which applies towards defense costs only. For staffing firms, the pool of carriers that provide comprehensive EPLI coverage is slightly limited, as most carriers aren't willing to provide coverage for suits made by temporary employees or extend coverage to defend and/or pay damages on a client company's behalf for suits made by temporary employees, which many staffing firms agree to cover contractually.

Between those carriers, the offerings for wage and hour coverage vary significantly. Some are unwilling to offer coverage, while others restrict coverage to suits made only by internal corporate employees and some offer sub-limited defense cost. For those that offer defense cost coverage on a sub-limited basis, the coverage is usually restricted to a $100,000 limit and may require taking a higher deductible than would otherwise be required to obtain a quote without wage and hour defense coverage. The carrier's willingness to provide the coverage will also depend on the individual loss results and risk management procedures of the staffing firm.

The influx of these suits has also resulted in numerous insurance companies selling endorsements that provide coverage for FLSA wage and hour claims. Many of these endorsements don't provide indemnification and only provide coverage for defense costs, which easily can escalate and total in the millions of dollars. Although coverage of defense costs is of great benefit, policyholders must understand the scope of exactly what type of coverage they are purchasing for FLSA claims and wage and hour class action lawsuits.

Standalone coverage for Wage and Hour violations may be available through certain unique insurance producers. These coverages typically are written through off-shore carriers and provide unique coverage for this evolving severity exposure.

Third-Party Liability

Coverage for lawsuits brought by third parties, such as customers, continues to gain attention. Although early coverage forms applied only to discrimination, more are now applicable to both discrimination and harassment. Not all coverages are alike. Some restrict the coverage to business relationships, which is not unreasonable, and may limit harassment coverage to sexual harassment, which may not be as reasonable.

Workplace Violence

Despite this all too common occurrence, not many insurers offer this type of coverage due to a weak demand. A lot of employers don't see workplace violence as an insurance issue.

Joint Employer Coverage

The need for joint employer coverage is relatively recent and only applies to specific employer sectors. This type of coverage, however, may take on a greater need as politicians and regulators seek to bring employment protections to nontraditional job relationships.

Prior Acts Coverage

Prior acts coverage is a valuable protection that was traditionally was difficult to obtain. Underwriters were hesitant to insure the prior activities of an employer, thinking that only those companies that needed coverage would buy prior acts protection. They soon came to realize the reality, however, that the EPLI exposure is one that all employers face and that even the most managed risks still need coverage. As insurers became more comfortable with the risk of a prior act, they more readily offered the coverage to new insureds. In fact, for many insurers, there is no additional cost for prior acts coverage. So, we now see insurers reporting that they include prior acts in their standard coverage, with the option of limiting the exposure via retroactive dates. Even those that do not include it in their standard form can include it by endorsement.

V. Overlapping coverages

Fiduciary Liability

Individuals involved with managing trustee, medical, disability, life, retirement, pension, and other employee benefit plans are faced with ever-increasing scrutiny and compliance requirements due to ERISA and similar regulations. And, institutions that administer the plans are at risk for claims including: Errors and omissions, civil penalties related to prohibited transactions, compensatory damages, and associated defense costs. Under ERISA, an individual is a fiduciary based not on job title, but on whether he or she has control or authority for plan management or administration. This often includes administrative staff, officers, and trustees of the institution. If a plan participant sues for benefits and breaches of fiduciary duty, a fiduciary may be personally liable to restore any losses or to restore any profits made through improper use of plan assets. Transferring investment or plan decisions to an outside party will not remove all liability of the plan fiduciaries. Only one-quarter of private companies hold fiduciary liability insurance policies. A contributing factor is that 51% of private companies hold the mistaken belief that they are covered under their CGL policy.

D&O Liability

D&O and EPLI seemingly overlap at first glance. First, both policies deal with liability issues in the workplace. Both typically exclude claims of bodily injury and property damage. Moreover, D&O and EPLI policies may cover C-level executives in management claims, such as mismanaging benefits. However, the difference, while subtle, is significant. To know which policy applies, you have to understand the impetus of the claim. If the claim comes back to negligence (i.e., the failure to behave with the standard of care that a prudent person would have exercised in similar circumstances), the C-level executive's D&O policy may be most applicable. EPLI, on the other hand, centers on claims when employee rights are violated.

Most private companies think they are protected from private lawsuits because their company is not publicly traded, however private companies carry as much D&O risk as public ones. In fact, the average cost of a lawsuit against a director or officer for a private company is nearly $700,000, the report found. Moreover, personal lawsuits against private company directors have skyrocketed in recent years.

VI. Defense Provisions

Duty to Indemnify vs. the Duty to Defend

Under a duty to indemnify, the insurer is obligated to pay for liability arising from a covered lawsuit, usually by way of a formal judgment against the insured or through a settlement between the insured and the underlying claimant. On the other hand, under a duty to defend, the insurer is obligated to, at a minimum, pay fees and costs incurred by an insured in defending against a lawsuit which may result in a judgment or settlement that would trigger the insurer's duty to indemnify. The distinction is an important one.

Duty to Indemnify

The duty to indemnify is a more limited obligation under which the carrier will advance or reimburse the reasonable costs associated with defending the covered claims within a lawsuit. Reimbursement means that the insured manages the defense of the claim and expenses in so doing are reimbursed from the insurer to the insured. Here the onus is placed on the insured to retain defense counsel and defend the suit and reimbursement may be subject to allocation between covered and uncovered claims. Organizations with large exposure or with significant experience in defense of these types of claim, may request reimbursement basis. Most of the companies that request this type of provision are upper echelon organizations that want an independent choice of counsel and do not require cumbersome oversight from the carrier. These are generally more sophisticated companies in terms of having formal policies and procedures in place, employee handbooks, in-house legal and risk management departments, formal HR departments, etc., including such companies, for example, as Wal-mart, GoldmanSachs, JP Morgan Chase, Costco, Boeing, etc.

Duty to Defend

A duty to defend a lawsuit, on the other hand, will require the carrier to actively participate in and manage the defense of all claims as soon as notice is filled with the carrier. Under a duty to defend, the insurer will retain and pay defense counsel on behalf of the insured. Most EPLI carriers like to exercise control over assigning defense counsel to a claim. Often, the carrier will have a "panel" of attorneys that have been vetted and agreed to accept fees at a discounted or negotiated rate. Most organizations prefer duty to defend, since the carriers are much more experienced in the defense of employment practices claim in most circumstances. This coverage also provides them access to nationwide claims and legal experts at reduced rates. The types of organizations that will benefit most from this type of provision are companies are generally lower echelon companies that do not have a formal HR, in-house legal, or risk management

departments, such as some restaurants, retailers, nail salons, mom-and-pop stores, and other similar companies as well as companies seeking more certainty on payment of defense expenses.

VII. Alternative Coverage: Punitive Damages

Certain states prohibit coverage for either punitive damages or intentional acts, either by regulation or on a theory that such coverage is contrary to public policy (or both!). There are 16 states that prohibit or restrict coverage for either punitive damages and/or intentional acts, including New York, Ohio, Florida, and California. Almost every insurer offers separate coverage to fill in such potential gaps in coverage, either via most favorable venue wording or with an off-shore wraparound in a jurisdiction such as Bermuda that does not restrict such coverage. Several carriers are reluctant to disclose that they offer such coverage; for fear that regulators might target their offshore solutions.